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Green Regs and Ham: Some Thoughts on Contaminated Sites, the *Redwater* Decision and the Principle of Intergenerational Equity

By: Nigel Bankes

Note: This post is a revised version of remarks presented at the Fifth Green Regs and Ham Breakfast convened by the Environmental Law Centre, Edmonton on October 3, 2017. The session was entitled "Municipal Environmental Jurisdiction: Contaminated sites and hockey fights" but my remarks principally addressed liability for abandonment and reclamation of oil and gas wells and facilities.

Good morning. I acknowledge that we meet on the traditional territory of Treaty 7 First Nations, the Blackfoot, Tsuu T'ina, and Stoney First Nations. It is particularly important to acknowledge that connection given that we are talking today about our stewardship and custodial responsibilities for the land (and perhaps more specifically our failings).

There are three parts to the presentation: first, I will offer some remarks on the Court of Appeal's decision in *Redwater*; second, some comments on a recent paper from the CD Howe Institute dealing with oil wells (see, Benjamin Dachis, Blake Shaffer and Vincent Thivierge, "All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells") and third, I will conclude with some more philosophical observations on the importance of the principle of intergenerational equity.

Redwater

As I think everybody in the room knows, the majority decision of the Court of Appeal in *Redwater* (aka *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 (CanLII)—and for a post on this decision see here) upholding Chief Justice Wittmann's decision (for a post on this decision see here) knocked out one of the main premises of the Alberta Energy Regulator's (AER) liability management scheme for oil and gas wells. That premise was that even in the case of an insolvency, the AER would still have access, effectively on a preferred basis, to all of the oil and gas assets of the insolvent licensee in order to fulfil the licensee abandonment and reclamation obligations. That premise in turn was founded on the assumption (validated to some extent by the decision of the Alberta Court of Appeal in *Northern Badger* in 1991, see *PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Limited*, 1991 ABCA 181 (CanLII)) that an abandonment order was not a provable claim in bankruptcy but was simply an order that had to be fulfilled by the licensee or by the receiver or a trustee in bankruptcy as part of the general law and not on the basis that the regulator was a creditor.

Redwater exploded that assumption. The Court applied the three part test of the Supreme Court of Canada's majority decision in *Abitibi Bowater* (*Newfoundland and Labrador v AbitibiBowater Inc*., 2012 SCC 67 (CanLII)) with respect to the question of when a regulatory order should be

treated as a provable claim in bankruptcy. The *Redwater* majority ruled that the AER's abandonment orders were simply provable claims in bankruptcy and thus effectively worthless since they would stand in line until the interests of the secured creditors were satisfied. And while they were at it, the *Redwater* majority concluded that the trustee could disclaim the unproductive assets of the bankrupt's estate and that the AER could not use its power to refuse to allow transfers of well licences as an indirect means of ensuring that bankrupt licensees fulfil their abandonment and reclamation (A & R) obligations because in doing so it was creating an operational conflict or frustrating the purposes of the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA).

The AER and the Orphan Well Association (OWA) have sought leave to appeal and in support of that application have filed affidavit material from both Saskatchewan and British Columbia attesting to the impact of the *Redwater* decision on their oil and gas liability regimes. The AER also applied to the Alberta Court of Appeal for a stay in the implementation of the *Redwater* decision. That application was rejected in particularly trenchant terms by Justice Wakeling who ruled effectively that there was no Court order to suspend and that to make an order tantamount to suspension would be "heretical in nature", contrary to the doctrine of precedent and subvert the rule of law: see *Alberta Energy Regulator v Grant Thornton Limited*, 2017 ABCA 278 (CanLII). Application dismissed!

That is where matters stand at present; we are awaiting the Court's decision on the leave application which we might reasonably expect before the end of October 2017.
We could perhaps discuss in the Q and A the types of arguments that the AER/Orphan Well Association would need to mount in order to be successful—assuming that they obtain leave. [There was no discussion of this in the Q & A, but see below for some further comments on this issue.]

All's Well?

Regardless of the outcome of that leave application I don't think that anybody still believes that the AER's current liability management scheme is fit for its purpose—it simply leaves too much risk with the public. The *Redwater* decision is precisely the sort of disruptive event that should prompt positive change; and in that context it is worthwhile talking about some alternatives that might be available which brings me to this paper by Dachis et al recently published by the CD Howe Institute, "All's Well that Ends Well".

Dachis *et al* identify two challenges or problems and suggest a two part solution. The first challenge is to ensure that monies are available for A & R even in the event of insolvency; the second is to speed up the A & R process so that wells are not left suspended or inactive for long periods of time.

As to the first (ensuring that monies are available), the authors propose imposing a bonding requirement on all wells (the authors say on all producers but that doesn't make a lot of sense to me). The bond would be significant but it would not aim to cover the full expected liability (the argument is that a full liability bonding requirement would be inefficient and that we as society should be prepared to accept some risk in return for enhanced economic activity).

The bond would be payable by the firm (the licensee) but the firm might also elect to pay a fee to a bonding or surety agent who would put up the bond; alternatively the government might also establish such a bonding agency to ensure that small players are not driven out by lack of access to funds on the market for this purpose.

As for the second challenge, the authors propose to create an incentive to ensure timely abandonment of suspended wells. The authors reject the idea of a prescribed time period and prefer instead a price mechanism. While there might be different price mechanisms (e.g. a flat or an inclining fee), the authors prefer mandatory insurance on the basis that the premiums payable should vary across the industry to reflect the risks associated with different classes of wells and, in addition, perhaps the operating record of different licensees. This scheme should also provide an incentive to firms to maintain wells in production and provide an incentive to abandon in a timely way (to avoid paying the premiums). The insured amount should cover the full costs of A & R. The proposal would be fairer than the current system which imposes the orphan well levy on licensees regardless of their track record and makes the A & R responsibility for orphans a shared responsibility.

This seems to me, at least on a go forward basis, to be a fairly elegant solution both to ensure that sufficient monies are on hand for A & R and to provide an incentive for timely abandonment. I would be interested to hear more as to whether the insurance industry is up to the task of providing insurance at the granular level that the authors anticipate; if not a possible fall back is simply an inclining rate to maintain the status of the wells.

The Principle of Intergenerational Equity

Environmental lawyers like principles. You will frequently hear environmental lawyers refer to the principle of sustainable development, the harm avoidance principle, the precautionary principle and in this area especially, the polluter pays principle. One principle that gets less play is the principle of intergenerational equity. But I think that it is our failure as Albertans to take this principle seriously, and operationalize it in our laws and policies, that explains a lot about the challenges that we face as a society, both on the liability side of things but also on the revenue and spending side of things.

The principle of intergenerational equity has at least two aspects. The first is that the current generation should take care to ensure that our actions do not foreclose the options available to subsequent generations—whether we mean our grandchildren or seven generations out. That is the sense in which the principle is often incorporated into the principle of sustainable development and also the sense in which it appears in the stabilization objective of the United Nations Framework Convention on Climate Change (Article 2), i.e. to stabilize greenhouse gas emissions (GHG) at a level that would prevent dangerous anthropogenic interference with the climate system. The principle should therefore help us inform the ambition of our domestic (i.e. both Canada and Alberta) GHG emission reduction targets. It should also lead us in the present context to mandate faster A & R activities.

The second aspect of the principle of intergenerational equity is that the current generation should pay for the benefits that it receives, pay for the costs that it imposes, and not spend the entitlement of subsequent generations.

I think that within our profession it is public utility lawyers who are most used to operationalizing this aspect of the principle and with a very robust and detailed idea of who counts as a generation, i.e. that each class of customers in any year (if not any month) who receive a service should pay for the cost of that service—reflected most obviously in ensuring that each generation of customers contributes to the depreciation of the assets in the rate base that are used to provide service.

Another way to put this aspect of the principle is simply that "Those who benefit should pay." I think that it is fairly clear that we have not operationalized this principle enough in the design of our liability rules; the ultimate costs of A & R are not priced into the costs of production rather they are for the most part kicked down the road. The intergenerational equity principle directs that you shouldn't be able to do that unless you are making provisions now for that charge (and the CD Howe proposals are consistent with this).

The other element of this aspect of the principle of intergenerational equity is the expenditure side of things and the fundamental proposition of fairness that we not spend non-renewable resource revenues to subsidize our standard of living, i.e. that we cover our operating costs out of the taxes that we pay; and here of course we know that unlike Norway, we have been unable to resist the temptation to abandon that principle; and so while Norway's equivalent of a heritage fund recently reached US$1 trillion, Alberta's is a mere CDN $17 billion.

Some of you may think that reference to the heritage fund takes me far from the question of liability for contaminated sites but I think that what connects all of these areas is our failure to take seriously an important principle of fairness—namely the principle of intergenerational equity.

Thank you for listening.

Comments on Possible Arguments in *Redwater* Assuming that the Court Grants Leave

The AER and the OWA will face an uphill battle in overturning the Court of Appeal's decision in *Redwater* but they have some potential to do so if they can persuade the Supreme Court of Canada to re-examine the rules that it developed in *Abitibi Bowater* to try and identify when a regulatory order should be treated as provable claim in bankruptcy. It must be remembered that *Abitibi Bowater* was both an unusual and unique case and an easy case insofar as it was a one off attempt by the province to create a set-off argument to a possible NAFTA claim by Abitibi Bowater. There are several indications in *Abitibi Bowater* that the Court was concerned with substance over form and several suggestions that it regarded the Newfoundland government's actions as simply a colourable attempt to get around the BIA. Rules developed in that context are not necessarily relevant to the routine end-of-life obligations associated with oil and gas wells.

To be more specific, Justice Deschamps in *Abitibi Bowater* developed a three part test for assessing whether a regulatory order should be treated as a monetary claim and hence as claim provable in bankruptcy (at para 26): "First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation." (emphasis in original) It needs to be emphasised that this is simply a judicial test; it is not dictated by the terms of the BIA. In the Court of Appeal in *Redwater* most of the attention focused on the third part of the test but the first part of the test may merit further scrutiny. In *Abitibi Bowater* Justice Deschamps gives this part of the test an extraordinarily broad interpretation such that it loses any power to discriminate in determining whether a regulatory order amounts to a provable claim. Thus she suggests (at para 27) that this first test is met whenever a regulator "exercises its enforcement power against a debtor. When it does so it identifies itself as a creditor …". But this of course begs the question of whether the obligation to abandon a well, inherent in the initial licensing of the well, lends itself to being characterized as a debt owed to a regulator. That was clearly not the view of the Alberta Court of Appeal in *Northern Badger* as Justice Deschamps recognizes at para 44. The majority of the Court of Appeal in *Redwater* seems to suggest that the AER and the OWA conceded that the first test in *Abitibi Bowater* had been met (at para 37)—but this can hardly be the case since both the AER and the OWA clearly rely on *Northern Badger*'s characterization of the obligation.

The other area in which the AER and the OWA may well be able to make some progress relates to the scope of the power to disclaim. While I don't think that all of Justice Martin's argument in dissent in *Redwater* will prove to have traction, there is at least some scope to argue that the power to disclaim should be confined to those situations in which it is necessary to disclaim in order to allow the receiver or trustee to protect itself from personal liability. There is also room to argue that since the power to disclaim is limited to real property that it cannot apply to AER licences.

Finally, if the Court does not grant leave in *Redwater* it will be time for Alberta and other affected provinces to open negotiations with Ottawa with a view to amending the BIA so that it is less invasive of principles of cooperative federalism. The ideas referenced above also lend themselves to drafting changes for the BIA: i.e. a statutory definition of when a regulatory order is a provable claim (or a list of factors to consider) and a clarification of the breadth of the power to disclaim. For other ideas see Professor Anna Lund's excellent and thought provoking article, "Lousy Dentists, Bad Drivers and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017), 80 Sask L Rev 157.

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